

FILED

JAN 13 2006

T.S. MCGREGOR, CLERK  
U.S. BANKRUPTCY COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In re: )  
WILLIAM A. and MYRNA J. COAN, ) No. 05-11441-PCW13  
Debtors. ) MEMORANDUM DECISION RE:  
DEBTORS' MOTION FOR ORDER  
EXTENDING THE 11 U.S.C.  
§ 362 AUTOMATIC STAY  
(Docket No. 17)

THIS MATTER comes before the Court pursuant Debtors' Motion for Order Extending the Automatic Stay pursuant to 11 U.S.C. § 362(c)(3). The Debtors' Motion seeks to extend the automatic stay for the life of the plan unless sooner ordered or modified by the Court. This is the first motion of its kind filed in this Court under the 2005 revisions to the Code.

A motion to extend the automatic stay under § 362(c)(3) arises in situations wherein an individual debtor has had a case pending but which was dismissed within one year prior to the current case. The purpose of § 362(c)(3) is to limit the protection of the automatic stay when repeated bankruptcy cases are filed. In order to rule upon the pending motion, it is necessary for this Court to review the case docket of the Debtors' preceding case.

Debtors William and Myrna Coan filed a Chapter 13 proceeding on October 7, 2004, Case No. 04-07405-PCW13. The plan required the Debtors to pay \$1,776.00 to the Chapter 13 Trustee for two months and \$1,826.00 per month for the remaining 58 months of the plan. The home mortgage holder was Wells Fargo. In compliance with LBR

MEMORANDUM DECISION RE: . . . 1

ENTERED  
JAN 13 2006

1 2083-1(f)(1), regular monthly mortgage payments were to be made to  
2 Wells Fargo by the Trustee as well as payments to cure the pre-  
3 petition arrearage. The Debtors reported net monthly income of  
4 \$3,001.00. The plan was confirmed on January 11, 2005 without  
5 objection. No motion to lift the automatic stay was filed in the  
6 case. On June 23, 2005, the Chapter 13 Trustee filed a Motion to  
7 Dismiss for Non-Payment which was granted unopposed on July 22,  
8 2005.

9 Debtors' current Chapter 13 was filed on December 15, 2005.  
10 Assuming that § 362(c)(3) applies, the automatic stay would  
11 terminate on the 30<sup>th</sup> day after the filing of the case, which, in  
12 this case, would be January 17, 2006. Fed. R. Civ. P. 6.

13 NOTICE

14 A motion to extend the stay under § 362(c)(3) was filed  
15 January 6, 2006. LBR 4001(b)(2) requires such motions to be served  
16 on the Master Mailing List on ten-days notice, plus three days if  
17 notice is given by mail. The Debtors sought permission to shorten  
18 time and an order was entered allowing the Debtors on January 6,  
19 2006 to mail the notice of the motion and hearing scheduled for  
20 January 12, 2006 to the Master Mailing List. Debtors were  
21 authorized to provide facsimile notice to Wells Fargo and the  
22 Chapter 13 Trustee. Although the Court determined such notice was  
23 adequate under the circumstances of this specific case, the  
24 shortened notice allowed interested parties little time to file any  
25 objection and prepare for the hearing. In fact, Wells Fargo did  
26 not object to the motion or appear at the hearing. Better practice  
27 would be to file and serve the motion to extend the stay under  
28 § 362(c)(3) when the second case is filed, or immediately

MEMORANDUM DECISION RE: . . . 2

1 thereafter. This is particularly true in this District as  
2 typically hearings are not scheduled by the Court until an  
3 objection is filed and the motion becomes a contested matter.

4 REQUESTED RELIEF

5 By statute, the relief requested in the motion can only be  
6 granted after notice and hearing. The present motion is unclear as  
7 to whether the request is to extend the stay as to all creditors or  
8 to extend the stay only as to Wells Fargo. As no motions to lift  
9 the automatic stay were filed in the first case, § 362(c)(3)(C)(ii)  
10 is inapplicable. If the Debtors seek to extend the automatic stay  
11 as to all creditors, § 362(c)(3)(C)(i) would be applicable. If the  
12 Debtors seek to extend the automatic stay only as to Wells Fargo,  
13 § 362(c)(3)(A) and (B) are the only applicable sections. The  
14 distinction is of vital importance as the Debtors must demonstrate  
15 that the second case was commenced in good faith by a preponderance  
16 of evidence under § 362(c)(3)(A) and (B). However, under (C) there  
17 is a rebuttable presumption that the second case was commenced in  
18 bad faith, and the Debtors must overcome that presumption by clear  
19 and convincing evidence. At the hearing on January 12, 2006,  
20 counsel for the Debtors clarified that the request was to extend  
21 the stay as to all creditors. *In re Charles*, 334 B.R. 207 (Bankr.  
22 S.D. Tex. 2005) contains an excellent discussion of the respective  
23 evidentiary standards and burdens of proof.<sup>1</sup>

---

24  
25 <sup>1</sup>While the *In re Charles* opinion dated November 30, 2005 does  
26 not apply the law of the Ninth Circuit and is not persuasive  
27 authority on that basis, the graphs contained within the opinion  
28 are informative as to the respective burdens of proof and  
evidentiary standards.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22

23

24

25

26

27

28

1 Sections (a)(1) and (b)(1) of § 362 refer to the commencement or  
2 continuation of any judicial, administrative or criminal "action."  
3 Several other sections of § 362 refer to "actions" in the sense of  
4 formal, legalistic proceedings. For example, the commencement of  
5 a foreclosure is an "action" under § 362(b)(8), but repossession of  
6 collateral is an "act" under (a)(5). With Congress's repeated use  
7 of the word "action" in § 362 to refer to a type of formal  
8 legalistic proceeding or process, its use of the phrase "actions  
9 taken" in (c)(3)(A) must be interpreted to mean a legalistic  
10 process or proceeding which occurred in the past. If it had  
11 intended to mean any "act" which occurred in the past, it would  
12 have used the word "act." By using the term "action" in (c)(3)(A),  
13 Congress must have intended the word to have the same meaning as  
14 when the same word was used elsewhere in the statute.

15 Application of the usual rules of statutory construction  
16 results in the conclusion that if some formal legalistic proceeding  
17 has occurred prior to the commencement of the second bankruptcy  
18 case, the automatic stay is no longer applicable to that proceeding  
19 as of the 31<sup>st</sup> day after the commencement of the second case.  
20 Subsection (c)(3) only renders the stay inapplicable to that  
21 action, not to any "act" as referenced in (a)(3), (4), (5) or (6).  
22 *In re Paschal*, \_\_\_\_ B.R. \_\_\_\_ (E.D.N.C. 2006). There is no  
23 evidence in this case that any formalistic legal proceeding or  
24 "action" occurred prior to the commencement of the second  
25 bankruptcy case. Therefore, (c)(3) is inapplicable.

26 The timing of this matter has not allowed the Court or the  
27 parties a full opportunity to consider the above analysis nor did  
28 any creditor appear at the hearing. Any error in the analysis of

1 the applicability of § 362(c)(3) would have drastic consequences on  
2 the Debtors. For those reasons, the Court will also address the  
3 merits of the matter as though (c)(3) is applicable.

4 EVIDENCE

5 In support of their Motion, the Debtors submitted the  
6 Declaration of Myrna Coan, who explained that during her prior  
7 Chapter 13 case, the plan payment required a majority of her and  
8 her husband's disposable income. The Declaration states that their  
9 financial circumstances have since changed and their income has now  
10 increased. The Schedule "I" filed in the second case indicates a  
11 monthly net income of \$4,206.00. While the first case was pending,  
12 the Debtors were approached by a mortgage lender who misrepresented  
13 that a refinance of their home would be arranged. At the closing  
14 of the purported refinance, the Debtors were advised by the closing  
15 attorney not to sign the closing documents as they reflected a sale  
16 and "buy back" rather than a refinance.

17 The Debtors' current plan filed on December 15, 2005 provides  
18 for payment of \$3,001.00 for 36 months and is a 100% plan. The  
19 current monthly mortgage payment of \$1,298.00 is paid through the  
20 plan to Wells Fargo commencing January 1, 2006. The plan indicates  
21 an arrearage to Wells Fargo of \$35,100.00, paid at \$1,098.00 per  
22 month at 7.88% interest. The only other secured claim in the plan  
23 is on a vehicle in the amount of \$2,775.00, which is to be paid at  
24 \$88.24 per month.

25 Since the Debtors request an extension of the automatic stay  
26 as to all creditors, § 362(c)(3)(C)(i) must be examined in detail.  
27 As stated in *In re Charles*, 332 B.R. 538 (Bankr. S.D. Tex. 2005),  
28 these statutory provisions are at best, difficult to understand,

MEMORANDUM DECISION RE: . . . 6

1 and at worst, "virtually incoherent." Subpart (C)(i)(I) is not  
2 applicable as it governs situations where more than one prior case  
3 existed.<sup>2</sup> Subpart (C)(i)(II) relates to dismissals of the prior  
4 case for (aa) failure to file or amend pleadings (inapplicable in  
5 this case); (bb) failure to provide adequate protection  
6 (inapplicable in this case); or (cc) failure to perform the terms  
7 of a confirmed plan. Failure to pay as required by a confirmed  
8 plan is a failure to comply with the plan's terms, and that subpart  
9 renders the rebuttable presumption of bad faith applicable to this  
10 case. Subpart (C)(i)(II)(cc) is satisfied by the evidence that the  
11 Debtors may have been the victims of an unscrupulous mortgage  
12 lender.

13 A failure to pay is not only a failure to comply with the  
14 plan's terms under (C)(i)II(c), but is also related to and  
15 redundant to the analysis required by subpart (C)(i)(III) which  
16 addresses a "substantial change in the financial or personal  
17 affairs of the debtor." The Debtors have also submitted clear and  
18 convincing evidence of a substantial change in their financial  
19 affairs. Subpart (C)(i)(III) is further divided into subparts with  
20 (bb) being relevant in this case. That is the requirement that the  
21 second case most likely will result in a confirmed plan capable of  
22 being fully performed. This requirement of (C)(i)III(bb) is  
23 related to and redundant to part of the analysis under (3)(B). On  
24 its face, the plan and supporting schedules indicate that the plan  
25

---


26  
27 <sup>2</sup>Subpart (c)(4) also governs situations where more than one  
28 prior bankruptcy case existed. Fortunately, the current situation  
does not require the Court to address the difficulties caused by  
the inconsistencies between the two subparts.

1 has a reasonable probability of confirmation and there exists a  
2 reasonable probability of success.

3 CONCLUSION

4 Having heard the arguments of counsel for the Debtors, and  
5 having reviewed the record, the Court finds that the Debtors have  
6 rebutted the presumption under (C) (i) and established, by clear and  
7 convincing evidence, that the present Chapter 13 case was filed in  
8 good faith. The § 362 stay should be extended as to all creditors  
9 during the pendency of the case.

10 DATED this 13<sup>th</sup> day of January, 2006.

11  
12   
13 PATRICIA C. WILLIAMS  
14 Bankruptcy Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28